Hastings International and Comparative Law Review

Volume 16
Number 4 *Summer 1993*

Article 7

1-1-1993

The Broadcasting Activities of the European Community and Their Implications for National Broadcasting Systems in Europe

Wolfgang Hoffman-Reim

The Broadcasting Activities of the European Community and Their Implications for National Broadcasting Systems in Europe

By WOLFGANG HOFFMAN-RIEM*

I. GENERAL CONTEXT

A. Political and Social Significance of Broadcasting

Broadcasting is an economic phenomenon. For some time now, broadcasters have had substantial economic relevance as clients for other media industry businesses, as employers for a large number of people, and, above all, as advertising media. Economic relevance should not, however, disguise the fact that broadcasting also fulfills an important cultural function. Broadcasting is both an economic and a cultural phenomenon.

In a historical perspective, this is by no means new. The press, for example, has always been both an economic and a cultural phenomenon - something which could be particularly observed in the nineteenth century. Yet wherever political struggles sought to protect the freedom of communication, the more political aspect of journalism has come to the fore. The development of freedom of the press in Europe was decisively influenced by the understanding of freedom of the press found in the United States, as embodied in the First Amendment. In turn, the American idea of freedom of the press was inspired by developments in Europe, especially by the French Revolution. Consequently, freedom of communication and of the media is anchored today in a basic constitutional norm in most European coun-

* Professor of Law, University of Hamburg, Germany. The author would like to acknowledge the assistance of his student, Andreas Finckh, in writing this article. This article was presented in March 1993 at the Hastings International and Comparative Law Review's Eleventh Annual Symposium on International Legal Practice, "The European Community in Evolution: Toward a Closer Political & Economic Union."

tries or is otherwise protected by ordinary law or through the European Convention of Human Rights (ECHR).

The ideas of civil rights and civil liberties are rooted in the liberal understanding of basic rights. One important aim is the free development of individuals. Communication also renders a service to society. It is hoped that the exchange of information and views will create the opportunities and abilities to form opinions and to realize what is "right." Communication is a means of filtering out a "true" factual basis and, thus, reaching a decision acknowledged as meaningful (right). According to traditional free speech theory, there are at least four reasons for a special protection of free speech. They are related to:

(1) individual self-fulfillment;
(2) advancing knowledge and discovering truth;
(3) promoting democracy through a process of self-governing society and by checking abuses of power by public officials; and
(4) the functioning of society, especially assuming a proper balance between conflict and consensus, allowing social change, and fostering social integration.

Most European societies value freedom of speech not as an end to itself, but rather as a means to reach these normative objectives, especially the promotion of democracy. Therefore, mass communication is deemed to have an important socio-cultural dimension. Mass media renders a service to society. The government, especially the legislature, is assigned the responsibility of ensuring that the process of informing the public, of exchanging ideas, and thus of influencing the shaping of values by mass media functions in real freedom, not prejudiced by either the state or by private power holders.

Communicative development, therefore, is vitally important to social and political development. Especially in the nineteenth century, the conviction prevailed in Europe that freedom had to be primarily defended against the state, since it was the state which jeopardized it most. The fact that basic rights had been historically directed against the feudal order, that is, against the dominant agencies of state and societal power in this order, had been by and large forgotten. However, there also was an awareness of the threat posed by non-state agencies of power. In particular, the Church could jeopardize freedom of communication. This awareness, however, did not have a formative influence on the legal concretization of freedom. Basic rights were solely concretized as defensive rights, protecting individuals from interference by the state.

The situation changed somewhat during the twentieth century. The crisis of state regulation, the emergence of new "private" power holders, especially large, multinationally operating, multimedia enterprises, and the interdependence of numerous sectors of the economy have increased the awareness that there are new risks for the freedom of communication. These risks may require basic rights to do more than defend freedom against interference by the state. There has been a particularly intense discussion on this question in Germany.

The German Constitutional Court in particular, which has exerted a decisive influence on the political development of postwar Germany, developed a concept of basic rights from the start. This concept recognizes that basic rights are anchored in a host of different constitutional objectives, the primary one being the goal of democracy.[1] In the field of mass communications, the state is assigned the responsibility of ensuring that the process of informing the public and of forming opinions functions freely.[2] While there are almost no special regulations in the area of the press, Europe has a long tradition in broadcasting regulation. The justification is not limited to spectrum scarcity. Other justifications refer to prohibitive costs, to the threat of a high concentration of ownership, and to broadcasting's unique persuasiveness and influence on society. Government's affirmative role in guaranteeing the functioning of broadcasting order and in protecting the public interest, including the democratic quality of public discourse, has been recognized until now—even in a time of new electronic media, expanding distribution facilities, the advent of a merger of transmission technologies, and a convergence of broadcast and press law.

Appreciation of the various cultural dimensions of mass communications applies particularly to broadcasting. Broadcasting provides information as well as entertainment for the individual citizen. Its services are geared to the communicative orientation and development of citizens. Broadcasting is determinant of the development of informed political opinion and of social integration. It provides information - its primary function - about socially relevant events, articu-

1. *Cf.* Donald C. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany,* 53 S. CAL L. REV. 657, 673 (1980).

2. The main judgments of the Bundesverfassungsgericht (German Constitutional Court) are: Judgment of Feb. 22, 1961, 12 BVerfGE 205 (1962); Judgment of July 27, 1971, 31 BVerfGE 314 (1972); Judgment of Jun. 16, 1981, 57 BVerfGE 295 (1982); Judgment of Nov. 24, 1986, 73 BVerfGE 118 (1987); Judgment of Mar. 24, 1987, 74 BVerfGE 297 (1987); and Judgment of Feb. 5, 1991, 83 BVerfGE 238 (1991).

lates views held by the population, and helps to control the agencies of state and social power. In this manner, broadcasting fulfills a public task. How successfully it does so can become a question of survival for democracy.

B. The Public Task of Broadcasting as a Subject-Matter of Specific Communications Constitutions

The acknowledgement of the vital importance of the mass media in the development of informed political opinion is nothing new. It is at least as common in the United States as it is in Europe. The situation in Europe, however, reveals how broadcasting has *always* been regarded as a power factor. This explains why, in almost all European countries, governments have turned their attention to broadcasting and subjected it to strict supervision or even government control. This applies to Nazi Germany and the previous East Bloc states as well as to countries such as France or Spain, which until recently, had broadcasting systems which were relatively dependent on the government. In most countries, broadcasting has only gradually, albeit successfully, been able to free itself from the clutches of government. Ensuring independence from the government, however, need not necessitate reducing the state's regulatory responsibility for the structures of a free broadcasting order. Accordingly, all European states have extensive broadcasting laws that contain more trenchant regulations than those found in the U.S.

In Europe, confidence that the democratic function of broadcasting is best protected by market forces is not as widespread as in the United States. The prevalent European philosophy contends that the public interest can only be protected through special structures of the broadcasting system.[3] There are calls for safeguards to ensure programming quality,[4] diversity and impartiality of reporting, and broadcaster independence from agencies of state and social power. A further demand is that risks -for example, for minors -- be minimized.[5]

3. For an analysis of the German model prior to the extensive introduction of private broadcasting, with a comparative look to the United States, see Christopher Wittemann, Note, *West German Television Law: An Argument for Media as an Instrument of Self-Government*, 7 HASTINGS INT'L & COMP. L. REV. 147 (1983).

4. On the concept of programming quality, see K.E. Rosengren, *Quality in Programming: Views from the North*, 27 STUD. OF BROADCASTING 21 (1991).

5. For more information on the philosophy and individual organizational structures of European broadcasting, see *Vulnerable Values in West European Broadcasting*, *in* TELEVISION AND THE PUBLIC INTEREST (J.G. Blumler ed., 1992).

Of course, the belief that free competition in opinions is the best path to a diverse broadcasting system, and that deregulation is thus appropriate, is also supported in Europe. Under this view, the crucial question is whether regulation or deregulation is thus appropriate. The proponents of deregulation contend that the market model of broadcasting naturally leads to broadcasting diversity. At most, only minimal governmental regulation is justified to counter undesired developments. However, this view, which has become increasingly popular in Europe, is not held by the majority. The majority believes that empirical evidence validates doubts as to the suitability of reliance on market forces alone.

Consideration of different recipient interests in programming illustrates this problem. A glance at the programming strategies of most broadcasters shows that they are interested in monied, particularly younger viewers, whose consumption behavior can still be influenced, since the advertising industry mainly gears its messages to these target groups. Older and poorer viewers are less of a target for advertising. Thus, their communicative interests tend to be neglected. This neglect is politically unacceptable if the goal of equal communicative opportunities is desired. Protecting this goal is regarded as a basic requirement for the development of informed democratic opinion. A highly one-sided gratification of recipient interests, such as that set forth above, is viewed as market failure and a justification for legal safeguards or other measures, such as the support of public broadcasting, to offset the shortcomings of private broadcasting.

Accordingly, European broadcasting systems still emphasize the public task of the mass media and have, thus, not opted for a pure market model. The broadcasting order is anchored by law. At least programmatically and rhetorically, priority is given to the social and cultural orientation of broadcasting and not to its economic aspect. The organization of broadcasting in European states has been primarily influenced by its significance for the communicative development of the individual and the political-cultural process. This concept was originally realized through public monopolies, but European nations have since developed, to differing degrees, dual systems of private and public broadcasters. Even after opening up broadcasting to private broadcasters, it is still subject to regulations. The "public-service model," which subjects broadcasting to certain obligations as a public

trustee, is still the prevalent model.[6] These obligations may demand, for example, truthful and impartial information. Structural safeguards are also often elaborated to ensure diversity. In Germany, for example, a pluralistic composition of those bodies that have a decisive influence on programming in public broadcasting is thought to ensure such diversity.[7] Finally, regulations designed to prevent state or one-sided social influence are also important. The structures vary substantially from one country to another depending upon the means governments have at their disposal. In all European Community (EC) member states, however, broadcasting regulations constitute a separate communications constitution which relates to the individual political and social system.[8]

C. No Express EC Competences

The broadcasting orders in European countries are traditionally anchored in their respective political constitutions.[9] A Europe-wide regulation of broadcasting which takes up these traditions presupposes political union in Europe. Despite the 1986 Single European Act and the Maastricht Treaty, however, such a political union has not materialized.[10] During the past decades, the EC has been transformed from a system of basic international treaties into an organization with supranational character. The legal stipulations of the European Communities are indirectly and directly applicable in member states, with a fundamental precedence of European law. The Community, however, has neither comprehensive jurisdiction nor the power to determine the range of its regulatory competence. Rather, the EC's regulatory powers are limited to those enumerated in the

6. For an overview of the "public-service model," see, *e.g.*, EUROPE: EUROMEDIA RESEARCH GROUP HANDBOOK OF NATIONAL SYSTEMS, ELECTRONIC MEDIA AND POLITICS IN WESTERN EUROPE (H. J. Kleinsteuber et al. eds., 1986); *Broadcasting and Politics in Western Europe*, 8 W. EUR. POL. (Special Issue) (R. Kuhn ed., 1985); INTERNATIONALES HANDBUCH FÜR HÖRFUNK UND FERNSEHEN 1992/93 § D (Hans-Bredow-Institut ed., 1992-93).

7. Wittemann, *supra* note 3.

8. Compare also, on this aspect, the articles in *Media and the Law: The Changing Landscape of Western Europe*, 7 EUR. J. COMM. (Special Issue) (Wolfgang Hoffmann-Riem ed., 1992).

9. On the freedom of communication in the context of basic rights and on its implications for the media order in Germany, see W. Hoffmann-Riem, *Freedom of Information and New Technological Developments in the Federal Republic of Germany - A Case Law Analysis, in* TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION 49 (A. Cassese & A. Clapham eds., 1990).

10. BEUTLER ET AL., DIE EUROPÄISCHE GEMEINSCHAFT 43-44 (3d ed. 1987).

treaty: The EC can only issue regulations in areas in which it is empowered to do so by the Treaties of Rome.

The EC is still, first and foremost, an economic community. However, it is not restricted in its activities to the economy in the narrower sense, since economic integration is impossible without consideration of the economic aspects of social fields, including culture.[11] The main functions for the structuring of the political order, especially the establishment and sustainment of social integration and political unity, continue to rest with member states.[12]

Broadcasting, a field of activity which is only partly determined by economics, is therefore a borderline area of EC jurisdiction. Therefore, no provision in the Treaties of Rome expressly empowers the EC to become active in the field of broadcasting. Thus, the EC lacks competence to design an extensive broadcasting constitution.[13] Even an adoption of the Treaty of Maastricht would not initially alter this situation, despite the fact that this treaty partly deals with the "flowering of the cultures of the Member States." For example, the EC cannot issue regulations primarily aimed at developing informed democratic opinion and social integration. Furthermore, the EC cannot require broadcasters to be public trustees, demand broadcasters' independence from the state, or insist on programming commitments which guarantee diversity. It appears no one gave consideration to the idea of setting up a market for broadcasters when setting up the European Economic Community.

II. SPECIFIC BROADCASTING ACTIVITIES OF THE EUROPEAN COMMUNITY

A. Harmonization Tendencies and the EC's Economic Point of Reference

As previously mentioned, the Treaties of Rome do not provide for regulation of mass communications. It may seem surprising, therefore, that the EC adopted an extremely detailed regulation of television broadcasting activities in the Television Directive of October 3,

11. W.H. Roth, *Grenzüberschreitender Rundfunk und Dienstleistungsfreiheit*, 149 ZEITSCHRIFT FÜR DAS GESAMTE HANDELS - UND WIRTSCHAFTSRECHT (ZHR) 679, 684 (1985); I.E. Schwartz, *Rundfunk und EWG-Vertrag*, *in* FERNSEHEN OHNE GRENZEN (J. Schwarze ed., 1985).

12. H.P. IPSEN, RUNDFUNK IM EUROPÄISCHEN GEMEINSCHAFTSRECHT 40 (1983).

13. *See* Seidel, *in* FERNSEHEN OHNE GRENZEN, *supra* note 11; G. Herrmann, *Europa und die Medien*, 29 ZEITSCHRIFT FÜR URHEBER - UND VERLAGSRECHT (ZUM) 175 (1985).

1989.[14] This directive was coordinated with the European Convention on Transfrontier Television adopted by the Council of Europe on May 5, 1989. This convention applies to more countries than the EC Television Directive, but has a weaker legal priority. Furthermore, the Television Directive is only part of a more comprehensive EC audiovisual policy. For example, the EC audiovisual policy contains an action plan to promote the audiovisual industry and the process of harmonizing national copyright law via the Copyright Directive.[15] The EC leaders are also considering special merger control measures in the audiovisual sector. The following considerations, however, are limited to the television sector and thus above all to the Television Directive.

The motivation for legal harmonization in the EC is relatively easy to understand.[16] The traditional structures of the European markets in the audiovisual sector are still quite heterogeneous. The international ramifications of technology and industry, however, make it possible to think in terms of large regions and markets in telecommunications. In addition, European cooperation in broadcasting has a long tradition. A Europe-wide market for the production and use of broadcast programs has existed for some time, and there is multinational cooperation in their distribution. The privatization and development of satellite technology has also provided numerous commercial stimuli for harmonization. Broadcasting is also important to Europe's political integration. Industrial policy also requires a unified media market to ensure that European companies remain competitive.[17] Finally, there is concern that "Americanization" jeopardizes European traditions and cultural identity.[18] Therefore, since the beginning of the 1980s, the institutions of the EC have tried to create a "television without frontiers."[19]

Due to the lack of specific broadcasting competences, the EC's point of reference has been an economic norm: the free movement of services specified in article 59, paragraph 1 of the EEC Treaty. This

14. Council Directive 89/552 On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23 [hereinafter Television Directive].

15. *See* Jerome Huet & Jane C. Ginsberg, *Computer Programs in Europe: A Comparative Analysis of the 1991 EC Software Directive*, 30 COLUM. J. TRANSNAT'L L. 327 (1992).

16. On the goals of the EC in the audiovisual sector, see also E. HOLZNAGEL, MEDIA LAW AND REGULATION OF THE EEC (unpublished).

17. *See* Television Directive, *supra* note 14, pmbl.

18. On the situation of the European media market, see G.M. Luyken, *Europa 1992: Auch ein Binnenmarkt für Medien?* 2-3 RUNDFUNK UND FERNSEHEN (RuF) 167 (1989).

19. For further details, see D. KUGELMANN, DER RUNDFUNK UND DIE DIENSTLEISTUNGSFREIHEIT DES EWG-VERTRAGES 26 *et seq.* (Duncker & Humblot 1991).

provision applies directly to all EC states and prohibits regulations that impede the transfrontier exchange of remunerated services.[20] The free movement of services is a basic economic freedom of the EC, as is the free movement of goods, persons and capital. The EC's Court of Justice in Luxembourg has confirmed in several decisions that broadcasting is a "service" in this sense.[21] Unlike activities in member states, the EC takes economics as its point of reference.[22] In particular, the Commission of the European Communities has regarded its broadcasting activities as part of the effort to create a single market for services by 1993. This presumes a harmonization of laws. The Television Directive was issued with this presupposition in mind.

B. The Television Directive

The Directive has become the most important instrument of legal character in broadcasting.[23] In accordance with article 185 of the EEC Treaty, the Directive binds all members. However, it initially only requires members to issue corresponding national laws. If this obligation is neglected, a directive can take direct effect as long as its content is sufficiently concrete. While the EC Television Directive was to be implemented by October 3, 1991, some member states have yet to comply.

The Directive's application is limited to television; radio remains unregulated. The Directive requires all EC member states to supervise the compliance of broadcasters in their jurisdiction.[24] However, member states do not control broadcasters transmitting into their country from other countries. This "sender state principle" makes it much easier for broadcasters to broadcast in several EC countries.

The Directive has substantive regulations in only a few fields. Advertising and sponsoring are extensively regulated. The separation of advertising and editorial programming,[25] the limited admissibility

20. On the direct significance of the free movement of services for broadcasting with examples of court rulings, see HOLZNAGEL, *supra* note 16.

21. *See* Case 155/73, The State v. Sacchi, 1974 E.C.R. 409, 428; Case 52/79, Procureur du Roi v. Debauve, 1980 E.C.R. 833; Case 352/85, Bond van Adverteeders et al. v. Netherlands, 1988 E.C.R. 2085, 2125.

22. On the various services provided in connection with the organization of broadcasting, see D. Kugelmann, *Die Grenzen des Anwendungsbereiches der EG-Fernsehrichtlinie*, 25 DIE VERWALTUNG 515, 519 *et seq.* (1992).

23. For a more detailed look at the legal nature of the directive, see D. LASOK & J.W. BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 137 *et seq.* (5th ed. 1991).

24. Television Directive, *supra* note 14, art. 3(2).

25. *Id.* art. 10(1).

of isolated advertising spots,[26] and certain quantitative and content-related commitments are examples of such regulation. Furthermore, there is a complete ban on subliminal advertising techniques, surreptitious advertising, and advertising for cigarettes and other tobacco goods.[27]

Additional regulated fields are the protection of minors[28] and the right of reply.[29] Finally, the mildly worded quota regulation in favor of "European works" should be mentioned.[30] This protectionist provision, which is not merely culturally motivated,[31] urges member states "where practicable and by appropriate means" to ensure that broadcasters reserve a majority of transmission time for European works. This provision is disputed due to its dubious objective and doubts about its binding effects and ability to be implemented. The details of this dispute will not be dealt with here.

---

26. *Id.* art. 11.

27. *Id.* arts. 10(3)-(4), 13.

28. *Id.* art. 22. Article 22 reads: "Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence. This provision shall extend to other programs which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts. Member States shall also ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality."

29. *Id.* art. 23.

30. *Id.* arts. 4-6. Article 4(1) reads as follows:

> Member States shall ensure where practicable and by appropriate means that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Article 5 reads:

> Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10% of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regards to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

31. *See* Television Directive, *supra* note 14, pmbl. ("whereas coordination is nevertheless needed to make it easier for persons and industries producing programmes having a cultural objective to take up and pursue their activities").

These regulations are the sum total of the commitments for broadcasters imposed by the EC Television Directive. Individual states, however, can tighten the Directive's requirements for their broadcasters[32] and for advertising intended solely for their national territory.[33]

C. Significance of the Television Directive

In comparison with the broadcasting constitutions of the member states, these regulations are rudimentary indeed. There is no sign of the provisions which traditionally form the content of broadcasting norms in Europe. There are no stipulations safeguarding diversity and impartiality, no commitments to objective and extensive information, and no safeguards against an undesired concentration of economic and editorial power in broadcasting. Due to its limited competences, the EC does not even have the power to make most of these regulations. The EC thus limits its activities to a small section of those regulations which are a part of all European broadcasting constitutions.

The decisive question is whether the Television Directive is a definitive regulation of broadcasting in Europe. If it is, large portions of the broadcasting constitutions of member states are incompatible with European law, and the Television Directive is, thus, an extensive deregulation measure. In an order solely orientated towards economic freedoms, however, deregulation means implementation of the market principle. In this respect, therefore, non-regulation means supporting a certain broadcasting model, the almost pure market model. Such support would be associated with a renunciation of differentiated broadcasting models such as those which currently exist in the dual systems of European countries. Treating the Television Directive as a definitive regulation of broadcasting in the EC is thus tantamount to shifting paradigms.[34] Instead of culture, economics would be the focus of broadcasting regulations. However, whether or not the Television Directive can be viewed this way is a moot point.

The EC Commission, the initiator of the harmonization of broadcasting laws, originally adopted such a radically market-oriented stance. It presented this position in 1984 in its so-called "Green Pa-

32. *Id.* art. 3.

33. *Id.* art. 20.

34. *See* W. Hoffmann-Riem, *Rundfunkrecht und Wirtschaftsrecht - ein Paradigmawechsel in der Rundfunkverfassung?*, *in* RUNDFUNK IM WETTBENEIBSVECHT 13 *et seq.* (Wolfgang Hoffmann-Riem ed., 1988).

per" entitled "Television Without Frontiers."[35] The argument set forth by the Commission was a narrow interpretation of the reasons that could justify restrictions of the free movement of services provided for in article 59 of the EEC Treaty. The Commission also referred to the ECHR.[36] The initiator of this Convention was the Council of Europe, not the EC. Nonetheless, member states and the EC recognize the ECHR as binding. Together with the constitutional traditions of member states, the Convention strongly influences basic rights in the EC. It thus compensates for the absence of basic rights norms in EC treaties. Article 10 of the ECHR provides for freedom of expression, including broadcasting freedom.[37] Article 10 stipulates that individual states may subject broadcasters to licensing procedures. Through this provision the ECHR recognized traditional state competence for the regulations of broadcasting orders. Licensing also helped justify the public-interest commitments of broadcasting.[38] In its Green Paper, on the other hand, the EC Commission views licensing as merely a formal act which does not allow reference to criteria other than article 10, paragraph 2.[39] Values such as national security, public safety and order, were thus viewed as entitled to protection. The legitimacy of objectives relating to a specific broadcasting consti-

35. Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM(84)300 final of June 14, 1984.

36. European Convention on the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

37. Article 10 reads:

> 1. Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure or information received in confidence, or for maintaining the authority and impartiality of the judiciary.

38. For more details on the interpretation of ECHR art. 10, see WOLFGANG HOFFMANN-RIEM, RUNDFUNKRECHT NEBEN WIRTSCHAFTSRECHT 186 *et seq.* (1991); N. Petersen, Der Gestaltungsspielraum des mitgliedstaatlichen Rundfunkgesetzgebers im Bereich der Dienstleistungsfreiheit (1993) (unpublished Ph.D. dissertation, University of Hamburg, (Germany)). *See also* C. Engel, Privater Rundfunk vor der Europäischen Menschenrechtskonvention (1992) (unpublished Ph.D. dissertation, University of Hamburg, (Germany)).

39. For more on this, mainly in support, see Engel, *supra* note 38.

tution, therefore, was disputed. The Commission ignored the fact that no doubts had been expressed for decades about the compatibility of national broadcasting constitutions and article 10 of the ECHR. It also neglected the second cornerstone of the EC's protection of basic rights, the common constitutional principles of member states.[40] Furthermore, in light of such a narrow interpretation of the exemptions from the free movement of services, the inclusion of detailed regulations for advertising placement cannot be justified.[41]

Regardless of the view taken on a market model of broadcasting, a political argument against EC deregulation is that such developments in a democratic system must be based on a corresponding development of informed opinion in parliamentary institutions. Although the European Parliament was involved in the process of issuing the Television Directive, the Directive was not a legal instrument of Parliament, whose competences are still weak.

The EC Commission's argument in the Green Paper has been criticized in relevant literature and in political circles.[42] The European Court of Human Rights, which is responsible for the interpretation of the ECHR, has not definitively stated its position, but has assumed a mediatory role in various decisions.[43] Due to such criticism, the EC Commission has softened its position. Although the Directive's preamble still relates to the free movement of services and ECHR article 10, there is no longer mention of the illegitimacy of specific broadcasting regulations. The Commission has now emphasized that the Directive regulates "the minimum required to ensure free broadcasting" and does not affect the competence of member states for the organization, financing, and content of broadcasting. The Commission has stressed the importance of cultural independence and diversity. At least verbally, therefore, there is a declaration of support for broadcasting's socio-cultural function. However, this

40. *See* Case 44/79, Hauer v. Rheinland-Pfalz, 1979 E.C.R. 3727, 3750. On the constitutional traditions in the field of broadcasting, see Petersen, *supra* note 38.

41. For a detailed look at the criticism of the line of argument taken in the Green Paper, see Wolfgang Hoffmann-Riem, *Europäisierung des Rundfunks - aber ohne Kommunkationsverfassung?*, *in* RUNDFUNK IM WETTVENEIBSRECHT, *supra* note 34, at 201, 205.

42. In Germany, see, *e.g.*, Stellungnahme von ARD und ZDF zum Vorschlag eineir Rundfunk-Richtlinie, Media Perspektiven Dokumentation III/86, 121 *et seq.*; Beschluß des Bundesrates zum Vorschlag einer EG-Rundfunk-Richtlinie, Bundesratdrucks. 259/86 of Sept. 20. 1986, Media Perspektiven Dokumentation II/87, 143-44.

43. *See* Groppera Radio AG v. Switzerland, 173 Eur. Ct. H.R. (ser. A) (1990); Autronic AG v. Switzerland, 178 Eur. Ct. H.R. (ser. A) (1990).

concern does not find expression in individual regulations and may be mainly lip service.

As pointed out, member states still retained the power to make legal commitments for national broadcasters after the Directive was issued. In the fields of advertising and protection of minors, which have been harmonized by the Directive, member states are still allowed to subject their broadcasters to stricter norms. In fact, however, there is considerable pressure to reduce previous commitments. Strict commitments are handicaps for national broadcasters competing with foreign firms because states must allow almost unlimited journalistic and economic competition by foreign broadcasters, even if the latter are subjected to less strict commitments. This principle does not only apply to foreign broadcasters that are mainly oriented to their own audiences. Broadcasters that specifically transmit programs for the audience of recipient states should also be allowed to do so unimpaired.

In the age of transfrontier technology and growing international links, the number of internationally broadcast programs can be expected to increase. Some already exist today. They can indeed represent functional equivalents of national programs. If some broadcasters are exempted from programming commitments and diversity safeguards in a member state of the EC, they can gain a considerable competitive edge over broadcasters subjected to stricter commitments in other countries. This exemption would put an end to equal competitive opportunities. Furthermore, foreign broadcasters could use their journalistic power to one-sidedly influence the development of public opinion in other states. According to the EC Directive, the recipient state is powerless in the face of such activities. It can only respond to competitive imbalance by exempting its national broadcasters from impedimentary restrictions. Individual states, therefore, must deregulate to avoid discrimination against their national broadcasters. Member states are thus forced to liberalize in fields not definitively regulated by the Directive. In other words: Even though the regulatory power of the national broadcasting legislator is not directly affected, its de facto room for maneuver is restricted. If national legislators intend to maintain competitive opportunities for their broadcasters vis-á-vis foreign firms, they may be forced to refrain from using their regulatory power.

The Television Directive does not prohibit retention of a dual system comprising private (commercial) and public (fee-based) broadcasters. The pressure for liberalization, however, indirectly affects the

public service pillar of the dual broadcasting system. Due to the competitive situation, public broadcasting finds itself under tremendous pressure to adapt in order to maintain its previous position and to avoid becoming a broadcasting niche for an intellectual minority.[44] Such a process of adaptation to the behavior of commercial broadcasters can already be observed at a national level. Furthermore, political willingness to support public broadcasting is likely to decline if it cannot record sufficient ratings. This probability means that public broadcasters will try to obtain as large a slice of the mass audience "pie" as possible by sacrificing their programming philosophy—a phenomenon which can be observed everywhere.[45]

Irrespective of the regulatory jurisdiction of member states over their broadcasters, the Television Directive exerts substantial pressure to liberalize. It creates a pronounced tendency towards the deregulation, albeit legal deregulation, of broadcasting in Europe.

III. EFFECTS OF ANTITRUST LAW ON BROADCASTING

If the economics of broadcasting become increasingly important as a result of the Television Directive, interest must concentrate on legal instruments designed to support the efficiency of the economic market. The most important of these instruments are the antitrust regulations in the EEC Treaty[46] and the Merger Control Regulation of December 21, 1989.[47] Apart from their regulatory efficiency, a highly significant aspect is the extent to which they are able to take into account specific broadcasting interests.

A. Instruments of EC Antitrust Law

The main antitrust provisions in the EEC Treaty are contained in article 85. Article 85, paragraph 1 contains a ban on agreements or decisions which restrain competition. Under certain conditions, the

44. *The Future of the BBC*, DEP'T NAT'L HERITAGE (London, November 1992).

45. The pressure to adapt has had varying consequences in the different European countries. Regarding the German situation, a comparative programming assessment shows that public broadcasting still has an independent programming profile. *See* U.M. KRÜGER, PROGRAMMPROFILE IM DUALEN FERNSEHSYSTEM 1985-1990 (1992). For information on the situation in Britain, see BBC PUBLICATIONS, EXTENDING CHOICE: THE BBC'S ROLE IN THE NEW BROADCASTING AGE (1992).

46. On the application of these norms in the field of broadcasting, see HOLZNAGEL, *supra* note 16.

47. 1989 O.J. (L 257) 14.

Commission can, in accordance with article 85, paragraph 3, exempt agreements normally covered by the ban.

Article 90, paragraph 2 declares the rules of competition inapplicable to undertakings in the general economic interest insofar as application of such antitrust rules would obstruct the performance of tasks assigned to such undertakings.

Finally, the EC's Merger Control Regulation, which became effective on September 21, 1990, should be mentioned. As opposed to directives, such regulations do not have to be turned into national law. In other words, they are directly applicable.[48] The Merger Control Regulation intervenes wherever mergers establish or strengthen a market dominant position, but only insofar as they are of Community-wide importance. Community-wide importance is determined on the basis of the turnover of the companies concerned. It is deemed to exist if:

- the worldwide turnover of the companies concerned exceeds five billion ecu;
- the Community-wide turnover of at least two of the companies concerned exceeds 250 million ecu; and
- the companies concerned do not record more than two-thirds of their Community-wide turnover in a single member state.

B. Applicability of Antitrust Law to Broadcasters

The EC's antitrust laws do not contain express regulations on audio-visual media. It is not clear to what extent they are applicable to broadcasting. Applicability of antitrust law to private broadcasters presents no problems. Publications on commercial law, however, have not hesitated to apply article 85ff of the EEC Treaty to public broadcasting as well.[49] Public corporations have taken the view that they are not "companies" as specified in the EEC Treaty. However, this view has not gained general acceptance.[50] Nevertheless, the EC Commission has not yet defined the programming activities of broad-

48. For more details on the legal nature of regulations, see LASOK & BRIDGE, *supra* note 23, at 127 *et seq.*

49. E.J. MESTMÄCKER ET AL., DER EINFLUB DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS AUF DIE DEUTSCHE RUNDFUNKORDNUNG (1990); V. EMMERICH & U. STEINER, MÖGLICHKEITEN UND GRENZEN DER WIRTSCHAFTLICHEN BETÄTIGUNG DER ÖFFENTLICHRECHTLICHEN RUNDFUNKANSTALTEN (1986); N. Reich, *Rundfunkrecht und Wettbewerbsrecht vor dem Forum des europäischen Gemeinschaftsrechts, in* RUNDFUNK IM WETTBENEIBSRECHT, *supra* note 34, at 224, 228-29, 235 *et seq.*

50. *See, e.g.*, Commission Decision 284/36, *Filmeinkauf deutscher Fernsehanstalten*, 1989 O.J. (L 2) [hereinafter *Filmeinkauf*].

casting as "market behavior." The activities of the EC, therefore, concentrate on preceding or successive stages of activity, such as program procurement and advertising.[51] In these areas, the applicability of European antitrust regulations is also recognized for public broadcasting.[52] The Commission has also made several decisions in these fields.[53] It has clearly indicated its intention to apply antitrust law in other cultural fields as well.[54]

The Merger Control Regulation is practically relevant only to privately operated broadcasting. In view of the dimensions involved and the high threshold requirements for Community-wide significance, however, it is highly improbable that this regulation will become important to broadcasting. Furthermore, no decision has yet been made as to the media. Due to the lack of regulations relating specifically to broadcasting, the Merger Control Directive is unable to relate to multimedia links. The print and audiovisual media in particular form separate markets. This leaves merger control ineffective in the absence of special regulation.[55]

C. Possibilities of Considering National Broadcasting Constitution Laws

As pointed out, national laws can, in consideration of their cultural task, grant broadcasters a special status which would otherwise be regarded as a restraint or abuse of competitive relations. An undifferentiated application of the antitrust regulations of the EEC Treaty, therefore, would have implications for the national broadcasting constitutions. The special characteristics allowed under broadcasting law, often applied in particular to public broadcasting, would be undermined by antitrust law. The regulatory jurisdiction of member states in the cultural sector would thus be reduced even further.

The question is, therefore, whether EC competition law is a point of reference for specifically considering communication matters. This is particularly doubtful with regard to article 85 of the EEC Treaty. The interpretation of vaguely defined legal terms, exemption deci-

51. On individual activities, see M. FRÖHLINGER, EG-WETTBEWERBSRECHT UND FERNSEHEN (1992).

52. *See* Reich, *supra* note 49, at 231.

53. *Filmeinkauf*, *supra* note 50; Commission Decision interpreting article 26 of the EEC Treaty, *Magill TV Guide V. ITP, BBC, RTE*, 1988 O.J. (L 78) 43.

54. Commission Decision interpreting Article 85 of the EEC Treaty, *UIP*, 1989 O.J. (L 226) 25; Commission Decision, "Netto-Bücher"-Vereinbarungen (Publishers Assoc.-Net Book Agreement), 1988 O.J. (L 22) 12.

55. FRÖHLINGER, *supra* note 51, at 7.

sions in accordance with article 85, paragraph 3, and the exemption provision of article 90, paragraph 2 of the EEC Treaty could be considered in this context. Article 90, paragraph 2, however, cannot be a transformer of broadcasting law. First, there are fundamental doubts about its applicability to broadcasters.[56] Second, the provision is only applicable if other provisions, such as the exemption procedures in article 85, paragraph 3, are useless points of reference. Finally, article 90, paragraph 3 only applies if a broadcaster's performance is otherwise obstructed. The requirements for exemption cases in line with article 90, paragraph 2 are strictly interpreted and those seeking exemptions carry the burden of proof.[57] The special regulation of article 90, paragraph 2, therefore, can have, at most, a very limited impact.

The exemption possibilities of article 85, paragraph 3 of the EEC Treaty only apply to the bans on trusts, not to abuses of market dominant positions. Exemption depends upon narrow definition requirements. Here too, the burden of proof rests upon those seeking undertakings.[58] The content of the exemption provision connects with aspects of economics. Economic aspects relating specifically to broadcasting could only be integrated here via extremely broad interpretation. This, however, has not been the case.[59] The EC Commission has generally been quite restrained in incorporating cultural values. There are no recognized means of taking into account the decisions of national legislators relating to the organization of broadcasting in the application of EC competition law. Once again, this exposes the fundamental problem facing the EC in its media activities: The EEC Treaty was not designed to establish the politico-cultural unity of member states in Europe. The EC lacks a political constitution and, consequently, a communications constitution. The lack of an EC communications constitution could eliminate the special features of respective cultural considerations when the EEC Treaty is applied to broadcasting. Under the EEC Treaty, broadcasting is solely subjected to the economic market.

56. For a discussion against applicability, see Television Without Frontiers, *supra* note 35, at 189, 192 *et seq.*; for a discussion in favor of applicability, see H.D. Jarass, *EG-Recht und nationales Rundfunkrecht. Zugleich ein Beitrag zur Reichweite der Dienstleistungsfreiheit*, 1 EUROPARECHT 75, 81 (1986).

57. I. Pernice in KOMMENTAR ZUM EWG-VERTRAG art. 90 at 53 *et seq.* (E. Grabitz ed., Munich: Beck).

58. BEUTLER, *supra* note 10, at 340.

59. Commission Decision 89/536, 1989 O.J. (L 284) 41.

IV. CONCLUSION

Non-Europeans often find it hard to understand many Europeans' concerns that economization of broadcasting can jeopardize the freedom of broadcasting. The advocates of broadcasting regulation are also sometimes accused of risking a dangerous state influence in this field. A look at the past suggests that such criticism of state influence is by and large justified. However, Europe has also developed independent broadcasting traditions. Britain's BBC is quite rightly regarded as a prototype of such a tradition. In countries such as Germany, models based on this prototype have been developed. These models aim to combine independent broadcasting with state involvement in the workability of the broadcasting constitution, in areas such as achieving diversity and protection against the concentration of power.

The values and traditions upon which the current European media culture is based are not legally questioned by the activities of the EC. However, partial harmonization through the Television Directive has exerted a strong de facto influence towards a market model of broadcasting. The undifferentiated application of competition law to broadcasting may also reinforce this tendency. There is an absence, at a European level, of mechanisms which take into account cultural requirements. A European political constitution is required. Without this, Europe's broadcasting order will develop irreversibly into a deregulated economic market. Europe would then gain a common media market, but lose the cultural and constitutional policy dimension of its communications constitution.[60] In the long term, such a reshaping of the broadcasting landscape would lead to a shift of paradigms with considerable legal and political implications.

60. For a critical view, see also B. Börner, *Kompetenz der EG zur Regelung einer Rundfunkordnung*, 29 ZUM 577, 586 (1985); WOLFGANG HOFFMANN-RIEM, EROSIONEN DES RUNDFUNKRECHTS (1990); M. Stock, *Europäisches Rundfunkrecht im Werden*, 2-3 RuF 183, 191 *et seq.* (1989).